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No. 87-___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

DEMENNO/KERDOON,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Federal Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Claims Court's Tucker Act jurisdiction over contract actions against the United States is impliedly repealed by the Emergency Petroleum Allocation Act of 1973 ("EPAA") when:

(a) the actions do not arise under the EPAA itself, but rather are founded upon contracts in which the United States agreed to be bound by EPAA price limits on sales of crude oil;

(b) the "implied repeal" theory rests on the United States' inconsistent contentions (i) that for purposes of EPAA actions in the district courts, it has not waived sovereign immunity, but (ii) that for purposes of contract actions in the Claims Court, claims founded upon contracts in which it agreed to abide by

EPAA price limits "arise under" the EPAA, and (iii) that since EPAA claims may be brought only in the district courts the EPAA impliedly repeals Tucker Act jurisdiction; and

(c) adopting these inconsistent United States' positions (separately approved by different courts of appeals) leaves private parties who contracted with the United States without remedy for its breach of express contractual covenants.

Rule 21.1 Listing. This petition seeks review of a judgment of the United States Court of Appeals for the Federal Circuit that was entered in two consolidated cases: Tipperary Refining Co. v. United States, No. 87-1233, and DeMenno/Kerdoon v. United States, No. 87-1234. There were no other parties in these consolidated proceedings below. Counsel for Petitioner DeMenno/Kerdoon is presently informed that Tipperary Refining Company will file a petition for certiorari seeking review of the judgment in No. 87-1233.

Rule 28.1 Listing. DeMenno/Kerdoon is a California corporation that has no parent company or subsidiaries. It has two corporate affiliates: Ashbury Oil Co., Inc. and D/K Properties.

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THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner DeMenno/Kerdoon respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") entered in DeMenno/Kerdoon, Plaintiff-Appellant v. The United States, Defendant-Appellee, No. 87-1234.

OPINIONS BELOW

The opinion of the Federal Circuit, reported at 833 F.2d 301, is set forth in the separately bound Appendix to this Petition ("App.") at A1. The opinion of the Claims Court, reported at 11 Cl. Ct. 572, is set forth in App. at A3.

JURISDICTION

The judgment of the Federal Circuit was entered on November 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

1. The Tucker Act, 28 U.S.C. § 1491(a)(1) (1982), which provides in pertinent part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Con-

> situation, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

2. Sections 23(a)(6) and 27(b),(e) of The Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1349(a)(6), 1353(b), (e) (1982), the pertinent texts of which are set forth in App. at A32 et seq.

3. Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1) (1982), the text of which is set forth in App. at A35.

4. Sections 210 and 211(a) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 742, 748-50 (1971), the texts of which are set forth in App. at A36 et seq.

STATEMENT OF THE CASE

DeMenno/Kerdoon brought this contract action against the United States in the Claims Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), alleging inter alia that the United States had breached two contracts in which it agreed to sell royalty in-kind oil to DeMenno/Kerdoon.

One of the contracts was for sale of oil from the Outer Continental Shelf (the "Offshore Contract"), and was entered pursuant to The Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1331 et seq. (1982) ("OCSLA"). OCSLA authorizes the Secretary of Interior to grant mineral leases of the seabed and subsoil of the Outer Continental Shelf under the jurisdiction and control of the United States, and to retain a royalty interest in the extracted minerals. 43 U.S.C. § 1337. OCSLA and regulations promul-

gated thereunder also permit the Secretary to take that royalty interest in kind and sell the resulting crude oil to small refiners such as DeMenno/Kerdoon.

Before the parties entered the Offshore Contract, the Congress -- in response to widespread complaints that the Department of Interior ("DOI") was refusing to comply with the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 et seq. (1982) ("EPAA"), and Department of Energy regulations thereunder -- amended OCSLA in 1978 to impose price restrictions on DOI's authority to sell royalty crude oil to small refiners. The 1978 OCSLA amendments required that DOI could sell such crude oil "for not more than its regulated price". 43 U.S.C. § 1353(b)(1). The 1978 amendments also defined the term "regulated price" as "the highest price . . . at which oil

[may] be sold pursuant to the Emergency Petroleum Allocation Act of 1973 . . . and any rule or order issued under such Act." 43 U.S.C. § 1353(e)(1)(A). Congress further required that DOI could sell or otherwise dispose of such royalty crude oil only "in accordance with any provision of law, or regulations issued in accordance with such provisions, which provide for the Secretary of Energy to allocate, transfer, exchange or sell oil in amounts or at prices determined by such provisions of law or regulations." 43 U.S.C. § 1353(b)(3).

On June 3, 1980 -- after the effective date of the 1978 OCSLA amendments -- the parties entered the Offshore Contract, in which the United States agreed to sell to DeMenno/Kerdoon royalty crude oil produced from the Outer Continental Shelf. Article V of the Offshore Contract pro-

vides, inter alia, that the United States "agrees to accept" and DeMenno/Kerdoon "agrees to pay for said royalty oil at the regulated price," and that "[t]he term 'regulated price' means the highest price . . . at which oil may be sold pursuant to the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751 et seq., and any rule or order issued under such Act".

The other contract between the parties was for the sale of oil from lands owned by the United States (the "Onshore Contract"), and was entered pursuant to the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181 et seq. (1982) (the "Mineral Act"). The Mineral Act, which regulates disposition of crude oil taken from lands owned by the United States, authorizes the Secretary of the Interior to sell royalty crude oil taken in kind

by the United States. It also permits the Secretary to grant preferences in the sale of such royalty oil to small refiners such as DeMenno/Kerdoon who do not have their own sources of supply of crude oil. 30 U.S.C. § 192.

On June 1, 1980, the parties entered the Onshore Contract, in which the United States agreed to sell to DeMenno/Kerdoon royalty in-kind oil produced from specified government lands. Article XIV of the Onshore Contract provides that the agreement is "subject to all . . . emergency laws of Congress now or hereafter enacted and to all valid orders, rules, and regulations now or hereafter issued pursuant to such laws".

DeMenno/Kerdoon's complaint in this action alleges the United States breached the price limitation provisions of the

Offshore and Onshore Contracts and, with respect to the Offshore Contract, violated the 1978 OCSLA amendments. The complaint was filed in the Claims Court pursuant to the Tucker Act, which provides that the Claims Court "shall have jurisdiction to render judgment upon any claim against the United States founded either upon . . . any Act of Congress . . . or any express or implied contract". 28 U.S.C. § 1491(a)(1).

The United States moved to dismiss the complaint for, inter alia, lack of jurisdiction, on the theory that:

(a) Section 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1), incorporates § 211(a) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 743, 748-50 (1971) ("ESA"), which in turn provides that "[t]he district courts of the United

States shall have exclusive original jurisdiction of cases or controversies arising under this title, or regulations or orders issued thereunder";

(b) Proof of the breaches of contracts and OCSLA violations alleged would require proof that the United States sold oil in excess of the maximum prices set by the EPAA and regulations thereunder;

(c) This action therefore "arises under" the EPAA (even though no claim under the EPAA is alleged); and

(d) Section 5(a)(1) of the EPAA therefore impliedly repeals the Claims Court's Tucker Act jurisdiction over contract actions alleging that the United States breached contracts in which it agreed be bound by EPAA price limits.

The Claims Court adopted the United States' jurisdictional theory and granted the motion to dismiss. Although the court stated that the complaint was "drafted specifically to invoke the elements of this court's Tucker Act jurisdiction" and did not allege any claim for violation of the EPAA, it reasoned that the "statutes and regulations involved in the alleged breach of those contracts during the regulated period are the ESA, the EPAA, and . . . pricing regulations thereunder"; that "the core of each of the claims under the Tucker Act . . . during the period of regulation is a violation of [these] pricing regulations"; and that "[these] statutory claims dominate the Tucker Act issues." App. at A17-A19. While acknowledging that "the Tucker Act is not specifically restricted in ESA § 211(a) or mentioned in its legislative history," the Claims Court

thought the "former statute cannot be reconciled with the later enacted statute", that "the two are not capable of co-existence", and that § 211(a)'s "grant of 'exclusive' jurisdiction to one court necessarily means the withdrawal of jurisdiction from all other courts, including [the Claims C]ourt." App. at A23-A24. The Federal Circuit affirmed on the basis of the Claims Court's opinion. App. at A2.[1]

Though the United States advanced here a jurisdictional theory based on "implied repeal" of the Tucker Act because district courts have exclusive jurisdiction over actions "arising under" the EPAA, it

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[1]EPAA price controls on oil were removed on January 28, 1981. So far as the complaint alleged breach of contract claims after that time, the Claims Court dismissed for failure to exhaust administrative remedies. App. at A25-A28. DeMenno/Kerdoon is not seeking review of that portion of the decision below.

has contended elsewhere that no EPAA actions may be brought against the United States in the district courts because the EPAA does not waive its "sovereign immunity." As the Claims Court acknowledged, the latter position has been upheld by the Temporary Emergency Court of Appeals ("TECA"), which (under § 211(b) of the ESA, also incorporated by § 5(a)(1) of the EPAA) has exclusive jurisdiction over appeals in actions "arising under" those statutes. Lunday-Thagard Co. v. Department of Interior, 773 F.2d 322 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1055 (1986), discussed in App. at A15-A16.[2] Thus, the consequence of the decision below (adopting the United

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[2]Lunday-Thagard was later reaffirmed in Transamerican Natural Gas Corp. v. Dept. of Interior, 816 F.2d 689 (Temp. Emer. Ct. App.), cert. denied, 98 L. Ed. 2d 150 (1987), citing, inter alia, the Claims Court's decision in this case. See 816 F.2d at 692-93.

States' theory here that the EPAA "impliedly repeals" the Claims Court's Tucker Act jurisdiction because claims "arising under" EPAA may only be brought in the district courts), coupled with the TECA decision in Lunday-Thagard (adopting the United States' theory there that actions "arising under" EPAA may not be brought against it in the district courts because it has not waived sovereign immunity), is that there is no remedy against the United States in any court for breach of a contract in which it agreed to be bound by EPAA price limits.

REASONS FOR GRANTING THE WRIT

The ultimate issue is whether Congress intended to repeal the Tucker Act and leave the United States free to violate not only Federal statutes but also contracts in which it expressly agreed to abide by price limits established by

those statutes, thus withdrawing from private parties their century-old statutory right to sue and obtain damages from the United States for breaches of contractual obligations it voluntarily undertakes. In effect, the decision below holds that whenever the United States voluntarily agrees in a contract to take actions that may also be required by a Federal statute, the contractual promise is meaningless and there is no Tucker Act claim for its breach unless the other statute itself independently creates a separate right of action against the United States apart from the contract.

This result stands the Tucker Act on its head, introducing a novel doctrine that will have a substantial and erroneous impact on Federal jurisprudence governing claims against the United States going far beyond the particular statutes

and private party involved in this case.

To reach that result, the courts below contravened this Court's precedents that repeal of the Tucker Act's jurisdiction and remedies is not to be "implied" from later enacted statutes and instead requires a clear and express indication of Congressional intention to do so. Those courts also contravened this Court's precedents governing the meaning of the term "arising under" in Federal jurisdictional statutes. Finally, those courts ignored the express statutory terms of OCSLA and rendered nugatory the central purpose of the 1978 OCSLA amendments.

Given the major significance of the erroneous jurisdictional principles applied below for the law governing claims against the United States, these issues are worthy of this Court's review. This

is particularly so because the Federal Circuit has exclusive jurisdiction over appeals in Tucker Act actions, 28 U.S.C. § 1295(a)(2), meaning that its errors in construing that Act and applicable Federal jurisdictional principles can only be corrected here.

I. The Decision Below Contravenes This Court's Precedents By Finding An Implied Repeal Of The Tucker Act In The Absence Of Any Clear Or Express Congressional Intention To Do So.

The complaint in this case alleges claims for breach of the United States' contracts and for violation of OCSLA. The Tucker Act provides "the consent of the United States to be sued eo nomine for the classes of claims described in the Act." United States v. Mitchell, 463 U.S. 206, 215 (1983). As this Court stated in Mitchell, "[t]he Court of Claims' jurisdiction over contract claims against the Government has long been re-

cognized, and Government liability in contract is viewed as perhaps 'the widest and most unequivocal waiver of federal immunity from suit.'" 463 U.S. at 215 (citation omitted). In addition:

> [T]here is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a claim falls within this category, the existence of a waiver of sovereign immunity is clear.

Id. at 218.

This Court has repeatedly held that repeal of Tucker Act jurisdiction and remedies will not be implied from later enacted statutes, nor found to exist in the absence of clear congressional intent to do so. The Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), are illustrative. There, no such implied Tucker Act repeal was found with respect

to Fifth Amendment "taking" claims arising out of a plan of reorganization under the Regional Rail Reorganization Act of 1973, even though that Act created a "Special Court" and provided for "the consolidation before [that court] of 'all judicial proceedings with respect to the final [reorganization] plan.'" 419 U.S. at 127 (citations omitted). Because this Court could find no unambiguous legislative history to support "the argument that the Rail Act should be construed to withdraw the Tucker Act remedy," it held that "applicable canons of statutory construction require[d]" the opposite result:

> [R]epeals by implication are disfavored. Rather, since the Tucker Act and the Rail Act are "capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Moreover, the Rail Act is the later of the two statutes and we agree with the Special Court:
>
> > "A new statute will not be read as wholly or even partially

> amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled . . .. This principle rests on a sound foundation. Presumably Congress had given serious thought to the earlier statute, here the broadly based jurisdiction of the Court of Claims. Before holding that the result of that earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it made a considered determination to that end . . .."

Id. at 133-34 (emphasis added; citations omitted).

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), applied the same principles in holding that the statutory procedure under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") did not repeal Tucker Act jurisdiction over a "taking" claim arising from the operation of FIFRA:

> In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a [later enacted] federal statute, the proper inquiry is not whether the statute "expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy," but "whether Congress has in the [statute] withdrawn the Tucker Act grant of jurisdiction to the Court of Claims . . . ."
>
> . . . Since the Tucker Act grants what is now the Claims Court "jurisdiction to render judgment upon any claim against the United States founded . . . upon the Consituation," we would have to infer a withdrawal of jurisdiction with respect to takings under FIFRA from the structure of the statute or from its legislative history. A withdrawal of jurisdiction would amount to a partial repeal of the Tucker Act. This Court has recognized, however, that "repeals by implication are disfavored."
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> * * *
>
> Congress in FIFRA did not address the liability of the government to pay just compensation should a taking occur. . . . [T]he failure cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy.

467 U.S. at 1017-18, 1018-19 (emphasis added by Court; citations omitted). Ac-

cord, e.g., Hatzlachh Supply Co., Inc. v. United States, 444 U.S. 460, 462-66 (1980) (per curiam) (Federal Tort Claims Act's express exclusion of claims arising from "detention of goods" did not impliedly repeal Tucker Act remedy for breach of implied bailment contract). Cf. Block v. Neal, 460 U.S. 289, 298 (1983) (Federal Tort Claims Act's express exclusion of Government liability for misrepresentation would not bar negligence claim raising "common factual and legal questions").

The decision below contravenes the important jurisdictional principles governing claims against the United States established by these precedents. Nothing in the EPAA (or the ESA, which it incorporates by reference) expressly withdraws Tucker Act jurisdiction over actions against the United States for breach of contract or violations of another Federal

statute. The Claims Court itself acknowledged that "the Tucker Act is not specifically restricted in ESA § 211(a) or mentioned in the legislative history." App. at A23.

Nonetheless, the Claims Court found an implied repeal of the Tucker Act, holding it "could not be reconciled" with the later enacted ESA and EPAA, with which it was "not capable of co-existence". App. at A23. Notwithstanding that the complaint was "drafted specifically to invoke the elements of this court's Tucker Act jurisdiction" and alleged no claim for violation of the EPAA, the court reasoned that DeMenno/Kerdoon's action was one "arising under" the EPAA because the EPAA issues involved in the United States' breach of its contracts and OCSLA violations "dominate the Tucker Act issues." App. at A17, A19. The court then

reasoned that since § 211(a) of the ESA gives "exclusive jurisdiction" to the district court in cases "arising under" the EPAA, this "necessarily means withdrawal of jurisdiction from all other courts, including this court. The two jurisdictions cannot exist together." App. at A24.

In adopting this chain of reasoning, the Claims Court looked not to precedents of this Court, but rather to decisions of the former Court of Claims by which it considered itself bound. App. at A20-A21. The Court of Claims decisions are in fact inapposite; and more important, the Claims Court's reasoning flouts the settled principles established by this Court in the decisions reviewed above.[3]

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[3]The cases the Claims Court purported to follow are The Poole & Kent Co. v. United States, 566 F.2d 1189 (Ct. Cl. 1977), and Metsch v. United States, 493

Giving the district courts "exclusive jurisdiction" of cases "arising under" the EPAA does not demonstrate a "clearly expressed congressional intention" to repeal the Claims Court's Tucker Act jurisdiction over actions for breach of contract and violation of OCSLA, even if price limits set by the EPAA and regulations thereunder may form some of the elements of the breach of contract and OCSLA claims. This Court has consistently refused to find implied repeal of the Tucker Act in cases presenting stronger arguments of "identical actions" and "conflicting jurisdiction" than any the United States can advance here.

F.2d 1232 (Ct. Cl. 1974). In fact, both cases presented challenges to the validity of administrative orders issued under the ESA and thus fell squarely within the terms of ESA § 211. Also, the plaintiffs in those cases did have remedies in the district courts; and neither case considered this Court's precedents on "implied repeal" of Tucker Act remedies.

For example, Hatzlachh Supply Co., Inc. v. United States held per curiam that the Federal Tort Claims Act's express exclusion of Government tort liability for claims arising from the detention of goods does not repeal the Tucker Act remedy for breach of an implied bailment contract arising out of the same transaction or occurrence. 444 U.S. at 462-65. In the Regional Rail Reorganization Act Cases, this Court found no conflict between the jurisdiction of the Rail Act's "Special Court" over "'all judicial proceedings' with respect to" the Act's reorganization plan and the jurisdiction of the Claims Court over a "taking" claim arising out of that plan, and held that the Rail Act and Tucker Act were "'capable of co-existence.'" 419 U.S. at 127, 133-34 (emphasis added).

In this case, DeMenno/Kerdoon's breach

of contract and OCSLA actions are no more "identical" to an action "arising under" the EPAA than the bailment action permitted in Hatzlachh was "identical" to the tort claim excluded under the Federal Tort Claims Act. Likewise, the Claims Court's Tucker Act jurisdiction can "co-exist" with the district courts' EPAA jurisdiction in this case as easily as it "co-existed" with the Rail Act "Special Court" jurisdiction in the Regional Rail Reorganization Cases. Contrary to the Claims Court's reasoning, the "two jurisdictions" here are plainly "capable of co-existence": Tucker Act actions "founded upon" breach of contract and OCSLA violations can be entertained in the Claims Court, while actions alleging claims (and therefore "arising") under the EPAA can be entertained in the district court under § 211(a) of the ESA. Since no "'clearly expressed congression-

al intention to the contrary'" is anywhere to be found, "'it is the duty of the courts . . . to regard each [statute] as effective." Ruckelshaus v. Monsanto Co., 467 U.S. at 1018, quoting Regional Rail Reorganization Cases, 419 U.S. at 133-34.

Indeed, in United States v. Palmer, 128 U.S. 262 (1888), this Court directly rejected Government objections to Tucker Act jurisdiction remarkably similar to those upheld here by the courts below. Palmer involved an action against the United States in the Court of Claims alleging breach of an implied contract for use of plaintiff's patent. At that time, there was no statutory basis to sue the United States for tortious patent infringement, and the Circuit Court had exclusive jurisdiction over patent infringement actions. This Court first

rejected the Government's contention that the substance of plaintiff's complaint was an inactionable claim for tortious infringement: "This is not a claim for an infringement, but a claim for compensation for an unauthorized use, -- two things totally distinct in the law". 128 U.S. at 269. The Court then rejected the Government's "object[ion] that an action cannot be brought in the Court of Claims on a patent, the Circuit Court having exclusive jurisdiction of this subject": "[W]hilst that objection may be available as to actions for infringement of a patent, . . . it is not valid as against actions founded on contracts for the use of patented inventions." Id. See also United States v. Berdan Fire-Arms Mfg. Co., 156 U.S. 552, 566-67 (1895).

The Claims Court's contrary reasoning here -- that the grant of EPAA jurisdic-

tion to the district courts "impliedly repeals" its own jurisdiction under the Tucker Act over actions against the United States -- is especially indefensible since the Government has successfully contended elsewhere that no cause of action against the United States arises under the EPAA. In Lunday-Thagard Co. v. Department of Interior, 773 F.2d 32[illegible] (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1055 (1986), TECA upheld the Government's position that the EPAA does not create a cause of action against the United States because it had not waived "sovereign immunity" under that statute. Here, the Claims Court -- which approved and followed Lunday-Thagard, see App. at A15 -- inconsistently held that its Tucker Act jurisdiction over contract and OCSLA actions against the United States has been "impliedly repealed" because the district courts have exclusive

jurisdiction over actions arising under EPAA, even though no action against the United States "arises under" EPAA in the first place.

This holding, coupled with the TECA holding in Lunday-Thagard, permits the Government to avoid its contractual obligations by engaging in jurisdictional sleight-of-hand that borders on a "shell game." When the United States is sued for EPAA violations in the district courts, it contends (and TECA agrees) that no action against the United States "arises under" the EPAA and the case must be dismissed for lack of jurisdiction. But when the United States is sued under the Tucker Act for breach of contract and OCSLA violations, it contends (and the Claims Court and Federal Circuit agree) that the action against it does "arise under" the EPAA, and therefore must also

be dismissed because the district courts have exclusive EPAA jurisdiction.

The Government's jurisdictional legerdemain thus creates a "Catch 22" under which the district courts have no EPAA jurisdiction over the United States, but the Claims Court has no Tucker Act jurisdiction over the United States because the action is "really" an EPAA claim over which the district courts have jurisdiction. This game was of course never intended by the Congress. Under the ESA statutory scheme (incorporated under the EPAA), § 210 first creates a cause of action for pricing violations, and § 211(a) then gives the district courts exclusive jurisdiction over "cases or controversies arising under this title". 85 Stat. 743, 748-50 (1971) (emphasis added); App. at A36-A38. If the Government is correct that § 210 does not cre-

ate a cause of action against the United States, then § 211(a)'s jurisdictional provision is by its terms -- and by the Claims Court's (and TECA's) own reasoning -- entirely inapplicable to the Claim's Court's Tucker Act jurisdiction over actions for breach of contract or violations of other statutes.

Nevertheless, the Government's game will continue unless this Court grants certiorari, because TECA and the Federal Circuit, which respectively have exclusive jurisdiction over EPAA and Tucker Act appeals, have each upheld the "half" of the "Catch 22" that is within its appellate province. No court, other than this one, has jurisdiction over both "halves" of the "Catch"; hence, no court, other than this Court, has authority to undo the repudiation of Congressional intent arising from approval by different

courts of appeals of both of the Government's inconsistent positions. For private parties who contracted with the Government, the result is that they are left without a remedy in any court when the United States violates pricing rules that it is obligated to follow -- independent of any statutory command -- under a contract it voluntarily entered. For the Federal judicial system, the result is that lower court holdings that adopt mutually inconsistent positions, having a substantial and erroneous impact on Federal jurisprudence governing claims against the United States, cannot be corrected unless the writ is granted.

Finally, with respect to the Offshore Contract the decision compounds these errors by ignoring entirely the impact of the 1978 OCSLA amendments on any supposed conflict between ESA § 211(a) and the

Tucker Act. As amended, OCSLA requires DOI not to exceed the regulated EPAA price in selling royalty oil to small refiners, 43 U.S.C. § 1353(b),(e), and creates a right of action against the United States for compensation for royalty oil sold above the maximum lawful price, Amoco Production Co. v. Hodel, 815 F.2d 352, 360 (5th Cir. 1987).[4] The 1978 OCSLA amendments also expressly provide (in 43 U.S.C. § 1349(a)(6)) that:

> [N]othing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

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[4]Ironically, in Amoco Production the United States successfully contended that suits against it for violation of the OCSLA had to be brought in Claims Court under the Tucker Act. The 1978 OCSLA amendments provide, inter alia, for a cause of action against the United States to "compel compliance" with the statute. 43 U.S.C. § 1349(a)(1). Such a statutory right of action permits recovery of overcharges made in violation of price control regulations. Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946).

Thus, the OCSLA amendments both (a) confer a statutory right of action for monetary compensation, and (b) preserve the Tucker Act's common law action for breach of contracts entered into pursuant to OCSLA -- both of which actions may be brought in the Claims Court under the express terms of Tucker Act. See 28 U.S.C. § 1491(a)(1). There is no conceivable way that these statutory provisions, enacted by the 1978 OCSLA amendments, could have been "impliedly repealed" by the earlier enactments of the EPAA and ESA.

II. The Decision Below Also Contravenes Settled Doctrine Governing The Meaning Of The Words "Arising Under" As Used In Federal Jurisdictional Statutes.

DeMenno/Kerdoon's complaint alleges claims for breach of express covenants in contracts between it and the United States, and for direct violation of

OCSLA; it does not allege any claim under the EPAA or ESA. The courts below nevertheless determined that the action was (in the words of ESA § 211) one "arising under" the EPAA and ESA. Although the Claims Court's reasoning on the point is not completely clear, it apparently so held because establishing the alleged contractual breaches and OCSLA violations would require proof that the United States sold oil in excess of the maximum prices set by the EPAA and regulations thereunder. See App. at A17-A19. In so holding, the courts below contravened this Court's precedents governing the meaning of the words "arising under" in Federal jurisdictional statutes.

As this Court has long held, "a suit arises under the law that creates the cause of action." American Well Works Co. v. Layne and Bowler Co., 241 U.S. 257,

260 (1916). In this case, the law that "create[s] the cause of action" is both OCSLA and the common law of contracts under the Tucker Act. See United States v. Mitchell, 463 U.S. at 215-26.[5] As this Court only recently held, for purposes of determining Federal question jurisdiction under 28 U.S.C. § 1331, a case does not "arise under" a given Federal statute merely because establishing a cause of action conferred by some other law will require as an element proof that the Federal statute was violated:

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[5]Because this case involves contract claims, it does not present the issue that led three Justices to dissent in Mitchell -- i.e., whether a statute creates any right to recover monetary damages in the first instance. In Tucker Act contract cases, "[t]he United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against the citizens under the same circumstances will be implied against [the United States]." United States v. Bostwick, 94 U.S. 53, 66 (1876).

> [A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. ___, 92 L. Ed. 2d 650, 664 (1986).

Thus, a breach of contract claim does not "arise under" the Federal patent laws (and thus fall within the exclusive jurisdiction of the Federal courts under what is now 28 U.S.C. § 1338(a)), even if the subject matter of the contract is a patent and adjudication of the claim will require interpretation and application of that Federal law. Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255 (1897). See also Phillips Petroleum Co. v. Texas, Inc., 415 U.S. 125 (1974) (Helium Conservation Act and Natural Gas Act); Pan

American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961) (Natural Gas Act); Moore v. Chesapeake and Ohio Ry., 291 U.S. 205 (1934) (Federal Safety Appliance Act). The contrary rule, as followed by the reasoning of the courts below, would open the Federal courts to breach of contract claims whenever a contract incorporates a provision of Federal law as a matter of the parties' private agreement.

In adopting the "arising under" language used in earlier statutes, Congress "must be considered to have adopted also the construction given by [the Supreme] Court to such language, and made it a part of the enactment." Shapiro v. United States, 335 U.S. 1, 16 (1948), citing Hecht v. Malley, 265 U.S. 144, 153 (1924). Nothing in ESA § 211(a) or its legislative history indicates that Con-

gress intended the term "arising under" to mean something different in that statute from what it has always meant under this Court's decisions. To the contrary, the express terms of ESA § 211(a) rebut any contention that Congress intended to give the district courts "exclusive jurisdiction" over every case that might involve ESA or EPAA price regulations, or an interpretation or application of Federal law thereunder. Section 211(a) provides that "nothing in this subsection . . . affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense . . . raised in any proceeding before such court." 85 Stat. at 748-49 (1971); App. at A38. This provision alone makes it abundantly clear that cases do not necessarily "arise under" the ESA or EPAA simply because a court may be required to resolve issues under those statutes and

regulations thereunder.[6]

The Claims Court reached its contrary and erroneous result despite the fact that DeMenno/Kerdoon's complaint was "drafted specifically to invoke the elements of this court's Tucker Act jurisdiction" and did not allege any claim for violation of the EPAA. App. at A17-A19. The suggestion implicit in the Claims Court's comment -- i.e., that a party to a contract who seeks to remedy its breach by filing a Tucker Act action for breach of contract is engaging in "artful pleading" to avoid EPAA jurisdictional rules

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[6]Similarly, Congress incorporated large portions of the EPAA into the Crude Oil Windfall Profit Tax Act, 26 U.S.C. §§ 4986 et seq. (1982 & Supp. III 1985). But Congress plainly did not intend to give the district courts (and TECA on appeal) "exclusive jurisdiction" over tax controversies under that Act; and the Claims Court thus has jurisdiction to decide EPAA issues in adjudicating windfall profit tax refund disputes.

-- is, to say the least, a novel idea. It also contravenes longstanding Federal jurisdictional law that "'the party who brings a suit is master to decide what law he will rely upon.'" Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1, 22 (1983), quoting The Fair v. Kohler Die & Specialty Co., 282 U.S. 22, 25 (1913).

In fact, it is the result below, not DeMenno/Kerdoon's complaint, that elevates form over substance. The contracts in question, rather than incorporating EPAA price limits by reference, could instead simply have set forth verbatim the identical words found in the relevant statutes and regulations without any citation to or mention of the statutes or regulations themselves. Had they done so, no one could credibly have contended that the words were anything other than

what they seemed -- terms of a contract that, if violated, would give rise to a Tucker Act action for breach of contract.

It is no less incredible to reach a different result, as did the courts below, merely because those contractual terms were simply incorporated by reference to the relevant statutes and regulations rather than set forth verbatim. In so doing, the decision below stood the Tucker Act on its head, holding in effect that whenever the United States voluntarily agrees in a contract to take actions that may also be required by a Federal statute, the contractual promise is meaningless and there is no Tucker Act claim for its breach unless the other statute itself independently creates a separate right of action against the United States apart from the contract.

Finally, the presumption against an aberrant construction of the term "arising under" is even stronger when, as here, the result is to abolish any remedy against the United States both for breach of its contracts and for violations of its obligations under a separate, later statute (the 1978 OCSLA amendments). As this Court has repeatedly said:

> The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.

United States v. Mitchell, 463 U.S. 206, 219 (1983); Block v. Neal, 460 U.S. 289, 298 (1983); United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 383 (1949).

III. The Decision Below Also Contravenes The Explicit Provisions And Central Purpose Of The 1978 OCSLA Amendments.

The touchstone of the issue decided

below is Congressional intent. The result of that decision (construing claims for OCSLA violations as "arising under" the EPAA), coupled with the TECA's decision in Lunday-Thagard (holding that no cause of action against the Government "arises under" the EPAA), means there is no remedy against the United States in any court for the OCSLA violations alleged in this case. This result necessarily renders nugatory the central purpose of the 1978 OCSLA amendments -- to require the Government to comply with applicable price regulations in selling oil to small refiners during the regulation period.

It is not credible that Congress intended, in enacting the 1978 OCSLA amendments, to engage in an exercise that would be rendered futile by judicial results such as that reached below. "[I]n-

terpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

Obviously, such an "alternative interpretation[] consistent with congressional purpose" is readily "available" here: Cases alleging violation of OCSLA "arise under" that statute, not the EPAA. This "interpretation[]" is particularly obvious since, as noted earlier, the 1978 OCSLA amendments both (a) confer a statutory right of action, and (b) preserve the Tucker Act's common law remedy for breach of contracts entered into pursuant to OCSLA. See pp. 34-36, supra.[7]

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[7]In advancing its jurisdictional theory below, the United States also contended, inter alia, that its violations were "few" and only "technical;" that the

CONCLUSION

For more than a century and for sound reasons of public policy, Congress has through the Tucker Act made the Government responsible in damages for breaches of its contracts and for violations of statutes that provide for monetary relief. United States v. Mitchell, 463 U.S. at 212-19. In this case, DeMenno/

Department of Energy might give DOI a "retroactive exemption" from the regulations; and that any recovery in this case would be a "windfall" to DeMenno/Kerdoon. If the United States advances these or similar contentions in opposition to this petition, the following should be noted:

First, such contentions go to the merits of the case, not to the issue of Claims Court jurisdiction. Second, this case has not been tried on the merits and there is no evidence of record to support these contentions. Third, whether or not the violations are accurately characterized as "technical," the Government has asserted claims for billions of dollars against oil companies for such violations of the EPAA. Indeed, the United States is presently asserting claims against DeMenno/Kerdoon for over $179,000,000 on the basis of such "technical" violations.

Kerdoon has brought an action under the Tucker Act to recover its own funds that were unlawfully extracted in violation of express contractual covenants as well as the provisions of OCSLA. There is no fair indication of any Congressional intention, much less one that is is "clear or express," to withdraw that jurisdiction and remedy merely because the alleged contractual breaches or statutory violations also involve the maximum price at which oil may be sold under the EPAA.

To reach that result, the courts below engaged at the Government's urging in what may charitably be termed creative statutory interpretation, an exercise that (1) contravenes settled principles governing purported "implied repeals" of Tucker Act jurisdiction by later enacted statutes; (2) ignores longstanding doctrine on the meaning of "arising under"

in Federal jurisdictional statutes; (3) is internally inconsistent with the Government's position in EPAA cases, adopted by TECA, that no cause of action against the United States "arises under" the EPAA itself; and (4) nullifies the purpose of later enacted legislation.

The petition for certiorari should be granted and the decision below reversed.

Respectfully submitted,

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Dated: February 13, 1988

87-1358

Supreme Court, U.S.
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CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

DEMENNO/KERDOON,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition For Writ
Of Certiorari To The
United States Court of Appeals
For The Federal Circuit

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87-1233

TIPPERARY REFINING COMPANY,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

87-1234

DEMENNO/KERDOON,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: November 17, 1987

Before DAVIS, Circuit Judge, SKELTON, Senior Circuit Judge, and NEWMAN, Circuit Judge.

PER CURIAM.

Appellants are two small business oil refiners each of which entered into

contracts with the Department of the Interior to purchase Government royalty oil. Such sales and purchases of Government royalty oil were subject to federal regulations from 1973 to January 28, 1981. Both companies filed suit in the Claims Court under the Tucker Act (28 U.S.C. § 1491(a)(1)) to recover for allegedly excessive prices collected by the Government contrary to that federal regulatory scheme. The Government moved to dismiss on the ground that there was no jurisdiction in the Claims Court to consider such claims. Judge Harkins of the Claims Court held that there was no such jurisdiction, and therefore dismissed the complaints. Tipperary Refining Co. v. United States, 11 Cl. Ct. 572 (1987). We agree with his views and affirm on the basis of that opinion.

AFFIRMED.

(Filed: January 23, 1987)

No. 283-86C

TIPPERARY REFINING CO.	) Contracts; Government Royalty Oil; Claims Court Jurisdiction;
v.	) Emergency Petroleum Allocation Act of 1973; 28 U.S.C. § 1491; 15 U.S.C. §§ 751 et seq.
THE UNITED STATES	)

Harry R. Silver, Washington, D.C., attorney of record for plaintiff. David A. Donohoe, Jerry E. Rothrock, and Akin, Gump, Strauss, Hauer & Feld, of counsel.

Dina R. Lassow, Washington, D.C., with whom was Assistant Attorney General Richard K. Willard, for defendant. Peter J. Schaumberg and Geoffrey Heath, Dept. of Interior, of counsel.

No. 299-86C

DEMENNO/KERDOON	) Contracts; Government Royalty
v.	) Oil; Claims Court Jurisdiction; Emergency Petroleum Allocation Act of 1973; 28 U.S.C. § 1491; 15 U.S.C.
THE UNITED STATES	) §§ 751 et seq.

Richard H. Streeter, Washington, D.C., attorney of record for plaintiff. Wheeler & Wheeler, of counsel.

Dina R. Lassow, Washington, D.C., with whom was Assistant Attorney General Richard K. Willard, for defendant. Peter J. Schaumberg and Geoffrey Heath, Dept. of Interior, of counsel.

MEMORANDUM OF DECISION

HARKINS, Senior Judge:

These cases come before the court on defendant's motions to dismiss for lack of jurisdiction over the subject matter or for failure to state a claim for which relief can be granted. Oral argument was heard on both cases on January 21, 1987. For the reasons stated below, the complaints are to be dismissed.

Plaintiffs are small business refiners whose only source of crude oil is that obtained from other sources.

These cases are concerned with plaintiffs' contracts to purchase Government royalty oil from the United States Geological Survey (USGS), a part of the Department of Interior (DOI). Tipperary Refining Co., plaintiff in case No. 283-86C, on June 5, 1980, entered an agreement for the sale and purchase of Government royalty oil pursuant to the Outer Continental Shelf Lands Act of 1953 (OCSLA). 43 U.S.C. §§ 1331 et seq. (1982). DeMenno/Kerdoon, plaintiff in case No. 299-86C, on June 3, 1980, entered an agreement for the sale and purchase of Government royalty oil pursuant to the OCSLA. The two contracts under the OCSLA are referred to as offshore contracts; each had 3-year terms, from July 1, 1980, to July 1, 1983. The offshore contracts were on standard DOI forms, and the terms

relevant to plaintiffs' claims are identical.

DeMenno/Kerdoon, on June 1, 1980, entered an agreement for the sale and purchase of Government royalty oil pursuant to the Mineral Lands Leasing Act of 1920, as amended, (MLLA). 30 U.S.C. §§ 181 et seq. (1982). This contract was for on-shore royalty oil; its term was from June 1, 1980, to June 1, 1983, and it was on a standard DOI form.

In January 1982, the Secretary established the Minerals Management Service (MMS), and transferred responsibility for administering the royalty oil program from the USGS to MMS. Secretarial Order No. 3071 (Jan. 19, 1982).

In both the MLLA and the OCSLA, Congress required, in substance, that the Secretary realize from sales of royalty oil at least the same amount of money for the Government that it would have if the royalties were taken in value rather than in kind. 30 U.S.C. § 192; 43 U.S.C. § 1334(a)(1) (1976). In 1978, Congress amended the OCSLA to provide that offshore royalty oil could be sold "for not more than its regulated price, or, if no regulated price applies, no less than its fair market value." 43 U.S.C. § 1353(b)(1).

Plaintiffs' contracts were made in DOI's onshore and offshore royalty oil programs. The MLLA and OCSLA authorize the Secretary of the Interior to grant oil and gas leases on federally owned lands and on submerged lands of the Outer Continental Shelf. The Secretary may

elect to take royalties accruing to the United States under such leases at the monetary value, or in oil. 30 U.S.C. § 192; 43 U.S.C. § 1353(a)(1). If taken in kind, the royalty oil may be sold to a defined class of small, independent refiners, such as plaintiffs. 30 U.S.C. § 192; 43 U.S.C. § 1353(e)(2).

From August 1973, to January 28, 1981, sales of Government royalty oil were subject to the pricing and allocation controls authorized under the Economic Stabilization Act of 1970, as amended, (ESA) (12 U.S.C. § 1904 note (1982)) and the Emergency Petroleum Allocation Act of 1973, as amended (EPAA) (15 U.S.C. §§ 751 et seq. (1982)). In August 1973, mandatory price controls on the sale of domestic crude oil and petroleum products initially were included in Phase IV of the Economic

Stabilization Program by the Cost of Living Council (CLC) pursuant to the ESA.

The EPAA, signed November 27, 1973, directed the President to implement a mandatory petroleum allocation program to minimize dislocations in the distribution of petroleum products, to meet priority needs, and to reduce the impact of such shortages on the American people and the domestic economy. Section 4(a) of the EPAA (15 U.S.C. § 753(a)) required the President to promulgate regulations providing for the mandatory pricing and allocation of crude oil. To carry out the policy goals of the EPAA, the President established the Federal Energy Office (FEO) which, in January 1974, issued Mandatory Petroleum Allocation and Price Regulations. On the pricing side, the FEO's regulations carried forward with CLC's regulations. 39 Fed. Reg.

1924 (Jan. 15, 1974). Responsibility for the regulation of petroleum pricing and allocation under the EPAA subsequently was transferred to the Federal Energy Administration, and to the Department of Energy. Department of Energy Organization Act, 42 U.S.C. §§ 7101 et seq. (1982).

Section 5(a)(1) of the EPAA incorporates by reference the regulatory scheme of the ESA, including the comprehensive system of judicial review provided through section 211 of the ESA. 15 U.S.C. § 754(a)(1). Section 211(a) in pertinent part provides:

> (a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy.

Section 211(b) in pertinent part provides:

> (b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designed by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. . . .
>
> (2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

All regulatory controls on prices were removed on January 28, 1981, by Executive Order No. 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981).

Tipperary's complaint, filed May 6, 1986, invokes the Tucker Act jurisdiction of this court (28 U.S.C. § 1491(a)(1) (1982)) and alleges defendant breached its offshore contract, unlawfully exacted money belonging to plaintiff, and took plaintiff's money without just compensation in violation of the 5th Amendment. DeMenno/Kerdoon's complaint, filed May 13, 1986, invokes the Tucker Act jurisdiction. The complaint alleges defendant breached the offshore and onshore contracts as a result of DOI's refusal to comply with the EPAA, DOE's regulations, and 1978 OCSLA amendments; that defendant unlawfully exacted money belonging to plaintiff as a result of DOI's breaches of its contracts, and that defendant took DeMenno/Kerdoon's property in violation of the 5th Amendment by charging prices for crude oil in excess of those permitted in the contracts.

Both plaintiffs contend the complaints spell out the types of claims recognized in the Tucker Act: (1) breach of contract, (2) violation of federal statutes and regulations, (3) unlawful exaction of monies, and (4) 5th Amendment takings of property. Tipperary seeks damages of at least $2 million on its claims, and DeMenno/Kerdoon seeks damages on all claims in both contracts of at least $3 million.

Prior to filing their complaints in this court, plaintiffs had attempted to recover for alleged violations of DOE price regulations through procedures under the EPAA. Tipperary on December 30, 1983, brought an action against DOI in the District Court of the Western District of Texas (Civil Action No. MO-84-CA-5) under ESA § 210 alleging that DOI had violated the EPAA price

regulations and had breached the contract. ESA § 210 authorized any person suffering a legal wrong because of any act arising out of the price control regulations to bring a district court action to recover up to treble damages, on the lapse of 90 days after a bona fide claim for a refund of the overcharge had been presented to the seller. Prior to the suit in Texas, Tipperary had demanded from DOI approximately $2.8 million in alleged overcharges. DeMenno/Kerdoon on February 19, 1986, sent a demand letter under ESA § 210 to DOI to recover for alleged overcharges under the onshore contract of $379,746.78 during the period June 1980 through January 1981. On March 17, 1986, DeMenno/Kerdoon sent a similar demand letter, citing OCSLA (43 U.S.C. § 1353(b)(1)), for overcharges under the offshore contract of $2,544,290.86 during the period July 1980 through January

1981. The demands in both letters were supplemented by a letter to DOI on April 2, 1986.

Plaintiffs' efforts to bring an action for statutory overcharges under ESA § 210 were thwarted by a decision of the Temporary Emergency Court of Appeals (TECA) in another case brought by counsel for Tipperary. Lunday-Thagard Co. v. DOI, 773 F.2d 322 (TECA 1985), cert. denied, 106 S.Ct. 972 (1986). TECA ruled in Lunday-Thagard that ESA § 210 did not contain a waiver of sovereign immunity, that the United States did not come within the definition of a "person", that the section did not provide the independent refiner with a cause of action for damages against the United States, and that breach of contract claims going to violations of the EPAA are cognizable only as statutory claims.

The contracts in Lundav-Thagard covered both offshore and onshore royalty oil, and included deliveries both during the regulatory period that ended January 28, 1981, and after that date. The TECA found that the claim for damages rested on alleged violations of the EPAA and the regulations implementing it, except for a relatively small claim seeking reimbursement for transportation payments, which was seen as a Tucker Act claim independent of any claim created by the EPAA. TECA affirmed the dismissal of the breach of contract claims that alleged violations of DOE price regulations, and remanded for resolution the Tucker Act issue of damages for transportation payments.

As a result of the Lundav-Thagard decision, the District Court for the Northern District of Texas on October 9,

1985, dismissed Tipperary's breach of contract claims going to violations of the EPAA. After further briefing on the breach of contract claim for transportation payments, the District Court on April 14, 1986, on Tipperary's suggestion, found that the claims for transportation payments exceeded $10,000, that the court lacked subject matter jurisdiction, and dismissed without prejudice.

The complaints in these cases are drafted specifically to invoke the elements of this court's Tucker Act jurisdiction: claims founded upon (1) the Constitution, or (2) upon any statute or regulation, or (3) any express contract, or (4) liquidated or unliquidated damages in cases not sounding in tort. The complaints and motion papers make it clear that

plaintiffs primarily are concerned with breaches of the offshore and onshore contracts that allegedly occurred before January 28, 1981, during the period crude oil prices were regulated. The statutes and regulations involved in the alleged breach of those contracts during the regulation period are the ESA, the EPAA, and the DOE pricing regulations promulgated thereunder. The 5th Amendment takings, during the regulation period concern property, in the form of money or claims, that would come into existence on proof of violations of the pricing regulations. The claims for monies illegally exacted, during the period before January 28, 1981, similarly, are based on breach of the contract provisions that call for payments at the regulated price.

In summary, the core of each of the claims under the Tucker Act presented in plaintiffs' complaints that arise during the period of regulation is a violation of the pricing regulations. Absent the central issue of the alleged violations of ESA, EPAA and DOE implementing regulations, no claim would exist for breach of contract, violation of statute or regulation, illegal exaction, or 5th Amendment taking. Clearly the statutory claims dominate the Tucker Act issues. The claims in plaintiffs' complaints that are based on sales transactions that occurred before January 28, 1981, arise under the DOE pricing regulations.

Plaintiffs argue that the jurisdiction over contract claims conferred in the Tucker Act exists concurrently with the statutory remedies and judicial review procedures

established in the ESA and the EPAA. Accordingly, plaintiffs would have this court proceed under the Tucker Act and determine whether DOI's actions prior to January 28, 1981, constituted a breach of the provision in Article V of the offshore contracts that the Government agrees to accept and the Purchaser agrees to pay for royalty oil "at the regulated price." Plaintiffs do not give effect to the system of judicial review Congress created in the ESA and made applicable in the EPAA. Nor do plaintiffs recognize the precedent, binding on this court, of the Court of Claims as to these issues.

In its enactment of ESA § 211, with respect to the claims identified in that section, Congress withdrew the jurisdiction this court otherwise would have had under the Tucker Act. Court of Claims precedent requires this

conclusion. The Court of Claims found that the text of ESA § 211(a) blanketed the court so that it could not scrutinize the merits of a civilian pay claim under the Back Pay Act (5 U.S.C. § 5596 (1982)) where the plaintiff challenged an order which rested on the ESA and the policies and guidelines of the Cost of Living Council and the Office of Emergency Preparedness. Metsch v. United States, 493 F.2d 1232 (Ct.Cl. 1974). Similarly, the Court of Claims found that ESA § 211 was effective to oust it of jurisdiction to hear a claim for alleged illegal exaction of money by the Cost of Living Council as a penalty for increasing plaintiff's profit margin for custom services contrary to the ESA. The Poole & Kent Co. v. United States, 566 F.2d 1189 (Ct.Cl. 1977).

These Court of Claims precedents are persuasive. No reason or logic justifies a different treatment for plaintiffs' breach of contract claims from the treatment that was accorded by the Court of Claims with respect to civilian pay claims and claims for illegal exactions that, but for ESA § 211, could have been heard under the Tucker Act jurisdiction.

Plaintiffs argue that the ESA § 211 procedure does not apply to their claims because the rules of statutory construction do not permit a subsequently enacted statute to amend or repeal a prior one, in the absence of an express declaration that Congress so intended. Amendment or repeal of Tucker Act remedies is not to be implied. Plaintiffs cite Regional Rail Reorganization Act Cases v. United States, 419 U.S. 102 (1974) and

Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984). When the former statute cannot be reconciled with the later enacted statute, however, and the two are not capable of coexistence, the intent of Congress to withdraw jurisdiction previously granted must be recognized. Regional Rail Reorganization Act Cases v. United States, 419 U.S. at 134; Ruckelshaus v. Mansanto Co., 467 U.S. at 1018.

In ESA § 211(a), Congress explicitly stated that the district courts shall have "exclusive original jurisdiction" of cases arising under the ESA. That regulatory scheme has been incorporated in EPAA and DOE pricing regulations. Although the Tucker Act is not specifically restricted in ESA § 211(a) or mentioned in its legislative history, the grant of "exclusive" jurisdiction to

one court necessarily means withdrawal of jurisdiction from all other courts, including this court. The two jurisdictions cannot exist together. The special judicial procedure created for review of the regulatory scheme included all of the remedies that otherwise would be available under the Tucker Act for claims arising under the Constitution, statutues, regulations, contracts, or illegal exactions. Accordingly, incorporation of ESA § 211 in the EPAA withdrew the jurisdiction of this court over plaintiffs' claims for breach of contract, violation of statutes and regulations, illegal exactions, and 5th Amendment takings that allegedly occurred during the regulation period and which arose from regulations duly promulgated by DOE.

In both the offshore and onshore contracts, the performance period included time after January 28, 1981, during which EPAA regulations were not applicable. During that later time, the Tucker Act jurisdiction of this court was not affected. The complaints in plaintiffs' cases for this period do not identify actions that allegedly would constitute a breach of contract. The briefing papers and argument, however, make it clear that plaintiffs' claims are concerned with prices charged during the period of regulation. Material relative to amounts of royalty oil purchased during the nonregulatory period is not presented, nor is pricing data. The amounts paintiffs claim as damages in their complaints, and at argument, are computed on the basis of transactions that occurred during the period of price regulation.

Article XI of the offshore contracts and Article X of the onshore contract provide procedures to resolve disputes. At argument, plaintiffs acknowledged that no efforts had been made to utilize these procedures as to DOI actions applicable to prices for sales made during the period after January 28, 1981. The disputes procedures provided in Article XI and X are not models of clarity, nor do they embody the procedures normally found in the standard disputes clause. DOI regulations, however, provide a right of appeal from a final order of the MMS Supervisor and an appeal to the Interior Board of Land Appeals (IBLA). 30 C.F.R. §§ 290.1 - 290.7 (1980).

Plaintiffs' complaints do not allege compliance with DOI's disputes procedures applicable to these contracts. In fact, plaintiffs did not attempt to pursue an

administrative remedy for disputes that arose from sales transactions that occurred after price control regulations expired. Plaintiffs assert their complaints state claims for breach of contract, that the claims do not "arise under the contract", and, accordingly, that pursuit of an administrative remedy is not necessary. Further, plaintiffs argue that any attempt at an administrative remedy would be fruitless. It is clear that the sales transactions that occurred in the post regulation period would involve numerous factual issues that would require resolution by the IBLA before any breach of contract issue could be determined.

There is no excuse for plaintiffs' failure to pursue the administrative remedy that was available. Plaintiffs' failure to exhaust the administrative

remedies available precludes judicial review at this time of plaintiffs' Tucker Act claims that are based on prices DOI found to be due in sales of royalty oil during the period after regulation. Richardson Camera Co. v. United States, 467 F.2d 491, 495-96 (Ct.Cl. 1972).

Defendant's motions to dismiss for lack of jurisdiction over the subject matter are ALLOWED as to plaintiffs' claims that arose from transactions that occurred during the period prior to January 28, 1981. Plaintiffs have failed to exhaust their administrative remedies as to claims that arise from sales transactions that occurred after January 28, 1981, during the terms of the contracts. Accordingly, the Clerk is directed to dismiss the complaint of Tipperary Refining Co., docket No.

283-86C, and the complaint of

DeMenno/Kerdoon, docket No. 299-86C.

/s/Kenneth R. Harkins
Kenneth R. Harkins,
Senior Judge

87-1233

TIPPERARY REFINING COMPANY,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

87-1234

DEMENNO/KERDOON,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the United States Claims Court IN CASE NO(S). 283-86 C & 299-86 C

This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/Francis X. Gindhart, Clerk
FRANCIS X. GINDHART, CLERK

DATED: November 17, 1987

ISSUED AS MANDATE: December 8, 1987
COSTS: Against, Appellants
PRINTING----------$460.08
TOTAL_____$460.08

STATUTES INVOLVED

1. The Tucker Act, 28 U.S.C. § 1491(a)(1) (1982), provides in pertinent part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

2. Section 23(a)(6) of The Outer Continental Shelf Lands Act, as amended, 43 U.S.C. § 1349(a)(6) (1982), provides in pertinent part:

> . . . Nothing in this section shall restrict any right which any person or class or persons may have under any other Act or common law to seek appropriate relief.

3. Section 27(b) of the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. § 1353(b) (1982), provides:

> Sale of oil by United States to public; disposition of oil to small refiners; application of other laws.
>
> (1) The Secretary, except as provided in this subsection, may offer to the public and sell by competitive bidding for not more than its regulated price, or, if no regulated price applies, not less than its fair market value, any part of the oil (A) obtained by the United States pursuant to any lease as royalty or net profit share, or (B) purchased by the United States pursuant to subsection (a)(2) of this section.
>
> (2) Whenever, after consultation with the Secretary of Energy, the Secretary determines that small refiners do not have access to adequate supplies of oil at equitable prices, the Secretary may dispose of any oil which is taken as a royalty or net profit share accruing or reserved to the United States pursuant to any lease issued or maintained under this subchapter, or purchased by the United States pursuant to subsection (a)(2) of this section, by conducting a lottery for the sale of such oil, or may equitably allocate such oil among the competitors for the purchase of

such oil, at the regulated price, or if no regulated price applies, at its fair market value. The Secretary shall limit participation in any allocation or lottery sale to assure such access and shall publish notice of such allocation or sale, and the terms thereof, at least thirty days in advance. Such notice shall include qualifications for participation, the amount of oil to be sold, and any limitation in the amount of oil which any participant may be entitled to purchase.

(3) The Secretary may only sell or otherwise dispose of oil described in paragraph (1) of this subsection in accordance with any provision of law, or regulations issued in accordance with such provisions, which provide for the Secretary of Energy to allocate, transfer, exchange, or sell oil in amounts or at prices determined by such provision of law or regulations.

4. Section 27(e) of the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. § 1353(e) (1982), provides in pertinent part:

As used in this section--

(1) the term "regulated price" means the highest price--

(A) at which oil many [sic] be sold pursuant to the Emergency Petroleum Allocation Act of 1973 [15 U.S.C. 751 et seq.] and any rule or order issued under such Act.

5. Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1) (1982), provides:

> Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall aply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

6. Section 210 of the Economic Stabilization Act of 1970, as amended, 85 Stat. 743, 748 (1971), formerly codified at 12 U.S.C. § 1904 note (1976), provides:

> (a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.
>
> (b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:
>
> (1) an amount not more than three times the amount of the overcharge upon which the action is based, or
>
> (2) not less than $100 or more than $1,000;
>
> except that in any case where the defendant establishes that the

overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, that where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term "overcharge" means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

7. Section 211(a) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 743, 748-49 (1971), formerly codified at 12 U.S.C. § 1904 note (1976), provides:

The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28].

Supreme Court, U.S.
FILED
APR 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1359 and 87-1380

In the Supreme Court of the United States

OCTOBER TERM, 1987

DEMENNO/KERDOON, PETITIONER

v.

UNITED STATES OF AMERICA

TIPPERARY REFINING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Claims Court had jurisdiction under the Tucker Act, 28 U.S.C. 1491, over claims, ostensibly involving breach of contract, that are based on alleged violations of price control regulations issued pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1359

DEMENNO/KERDOON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1380

TIPPERARY REFINING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2[1]) is reported at 833 F.2d 301. The opinion of the Claims Court (Pet. App. A3-A29) is reported at 11 Cl. Ct. 572.

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[1] References to the appendix to the petition are to the appendix in No. 87-1359.

JURISDICTION

The judgment of the court of appeals (Pet. App. A30) was entered on November 17, 1987. The petition in No. 87-1359 was filed on February 13, 1988. The petition in No. 87-1380 was filed on February 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of the Interior (DOI) grants oil and gas leases on federally owned lands and offshore properties under the Mineral Lands Leasing Act of 1920, 30 U.S.C. (& Supp. III) 181 *et seq.*, and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. III) 1331 *et seq.* The government retains a royalty interest in these leases, and the Secretary of the Interior is authorized to take royalties in money or in kind. If the Secretary elects to accept royalties in kind, the royalty oil may thereafter be sold to small independent refiners; if the Secretary makes any such sale, he must realize at least the same amount of money that the United States would have obtained if the royalties had originally been taken in cash. 30 U.S.C. 192; 43 U.S.C. 1353.

Petitioners are small refiners of crude oil. In 1980, DeMenno/Kerdoon, petitioner in No. 87-1359, entered into two contracts with the United States, through the United States Geological Survey, a sub-agency of DOI, to purchase royalty oil. One contract involved onshore oil, while the other covered offshore oil. Tipperary Refining Company (Tipperary), petitioner in No. 87-1380, entered into a contract with DOI for the purchase of royalty oil from offshore tracts in 1980. Pet. App. A5-A6.[2] Until

[2] Both contracts for offshore royalty oil provided that the price would be "the regulated price or, if no regulated price applies, * * * the fair market value price" (see 87-1380 Complaint Exh. A at A3;

January 28, 1981, maximum prices for different categories or "tiers" of crude oil were set by the Department of Energy (DOE) under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1), and the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note. During the time DOE price controls were in effect, producers were required to certify to their purchasers the volumes of oil purchased in each tier within a specified time. See, *e.g.*, 39 Fed. Reg. 1924 (1974); 41 Fed. Reg. 4931 (1976). The President terminated regulation of petroleum pricing on January 28, 1981. Exec. Order No. 12,287, 3 C.F.R. 124 (1982).

2. a. In January 1984 petitioner Tipperary filed an action against DOI in the United States District Court for the Western District of Texas. That suit was brought under Section 210 of the ESA, 12 U.S.C. (1976 ed.) 1904 note, which "authorized any person suffering a legal wrong because of any act arising out of the price control regulations to bring a district court action to recover up to treble damages" (Pet. App. A14).[3] Tipperary alleged that

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87-1359 Complaint Attach. at A3). The "regulated price" was defined as "the highest price (a) at which oil may be sold pursuant to the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. 751 *et seq.*, and any rule or order issued under such Act, or (b) at which Federal oil may be sold under any provision of law or rule or order thereunder which sets a price (or manner for determining a price) for oil." *Ibid.* DeMenno/Kerdoon's contract for onshore oil provided that DeMenno/Kerdoon would pay the market price and did not mention the regulated price (87-1359 Complaint Attach. at B2). In addition, all three contracts provided that they would be "subject to all war or emergency laws of Congress now or hereafter enacted and to all valid orders, rules, and regulations issued pursuant to such laws" (see *id.* at A8, B5; 87-1380 Complaint Exh. A at A8).

[3] Federal court jurisdiction under both the ESA and the EPAA is governed by Sections 210 and 211 of the ESA, 12 U.S.C. (1976 ed.) 1904 note (see 15 U.S.C. 754(a)(1) (EPAA and regulations thereunder

DOI had violated the EPAA regulations by imposing improper surcharges and by failing timely to certify the "tier" under which the price of the royalty oil sold to Tipperary was to be calculated. The complaint did not allege that if DOI's certifications had been timely Tipperary would have paid a lower price for the oil.[4] See 87-1380 Defendant's Mot. to Dis. App. 26-28. Tipperary also claimed that the violations of the EPAA regulations constituted breaches of its contract with DOI because of the provision subjecting the contract to all emergency laws of Congress. See *id.* at 28.

While Tipperary's action was pending in the district court, the Temporary Emergency Court of Appeals (TECA) decided *Lunday-Thagard Co.* v. *United States Dep't of Interior*, 773 F.2d 322 (1985), cert. denied, 474 U.S. 1055 (1986). In *Lunday-Thagard*, TECA held that sovereign immunity bars suits against the government under Section 210 of the ESA, including actions for breach of contract based on violations of the ESA or the EPAA. Accordingly, the district court, on October 9, 1985, dismissed Tipperary's action under Section 210 of the ESA, including its breach of contract claim based on violations of the EPAA, on the authority of *Lunday-Thagard* (Pet. App. A16-A17).[5]

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to be treated like ESA and its regulations for jurisdictional purposes)). Under Section 211(a) of the ESA, the federal district courts have "exclusive original jurisdiction of cases or controversies arising under" the ESA, and therefore the EPAA. Jurisdiction over appeals arising under the ESA or the EPAA is exclusively in the Temporary Emergency Court of Appeals (TECA) under Section 211(b) of the ESA.

[4] Of the roughly $2.672 million Tipperary sought in damages, some $2.617 million derived from the claim based on allegedly improper certifications. 87-1380 Defendant's Mot. to Dis. App. 28, 29.

[5] Tipperary had also alleged that DOI violated the contract by failing to reimburse it for transportation of the royalty oil away from the offshore platforms where it was collected, a claim which on its face appeared to be independent of the EPAA. The district court found

Tipperary thereafter brought this suit in the Claims Court on May 6, 1986. Tipperary alleged that DOI had breached the oil sale contract, that DOI had unlawfully exacted money from Tipperary, and that DOI had taken Tipperary's property without just compensation in violation of the Fifth Amendment. The complaint did not mention the EPAA or the DOE price regulations which had been the basis of Tipperary's action in the district court, although it sought approximately the same amount of damages. Moreover, the complaint did not state that Tipperary had exhausted its administrative remedies for the alleged breach (see 30 C.F.R. Pt. 290; 43 C.F.R. Pt. 4), or that Tipperary had followed the procedures set out in the Contract Disputes Act, 41 U.S.C. (& Supp. III) 601 *et seq.* See 87-1380 Complaint 2-6; see also Pet. App. A26.

b. Petitioner DeMenno/Kerdoon filed suit in the United States Claims Court on May 13, 1986. Like Tipperary, DeMenno/Kerdoon claimed that DOI had breached its contracts, that DOI had unlawfully exacted money, and that DOI had taken DeMenno/Kerdoon's property without just compensation. See 87-1359 Complaint 4-6.[6] The complaint did not allege that DeMenno/Kerdoon had pursued its administrative remedies under DOI regulations or its remedies under the Contract Disputes Act.

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that the amount of that claim exceeded $10,000 and therefore dismissed it without prejudice under the Tucker Act. Pet. App. A17.

[6] Prior to bringing this suit, DeMenno/Kerdoon, in letters to DOI, had alleged overcharges arising from violations of the EPAA regulations of roughly the amounts sought in this case. The vast bulk of those overcharges resulted from allegedly untimely certifications of the type complained of by Tipperary. DeMenno/Kerdoon, like Tipperary, did not suggest that it would have paid a lower price had the certifications been timely. See Pet. App. A14-A15; 87-1359 Defendant's Mot. to Dis. App. 2-18.

3. The Claims Court dismissed both complaints for lack of jurisdiction. While it recognized (Pet. App. A17-A18) that the complaints had been drafted specifically to invoke its Tucker Act jurisdiction, the Claims Court found that "the core of each of the claims under the Tucker Act * * * is a violation of the pricing regulations. Absent the central issue of the alleged violations of the ESA, EPAA and DOE implementing regulations, no claim would exist for breach of contract, violation of statute or regulation, illegal exaction, or 5th Amendment taking." *Id.* at A19.

The Claims Court then explained (Pet. App. A24) that Congress' grant of exclusive jurisdiction to the district courts in Section 211 of the ESA "necessarily means withdrawal of jurisdiction from all other courts, including this court." Accordingly, the Claims Court dismissed "plaintiffs' claims that arose from transactions that occurred during the period prior to [the termination of price regulation under the EPAA]" (Pet. App. A28). The Claims Court also dismissed any claims petitioners may have had that arose out of transactions occurring after decontrol, finding with respect to the post-decontrol claims that petitioners had failed to exhaust their administrative remedies (*id.* at A27-A28).

The Federal Circuit affirmed the Claims Court's decision in a brief per curiam opinion that relied on the lower court's reasoning. Pet. App. A1-A2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The lower courts properly relied on two fundamental and well-established principles of jurisdiction under the

ESA (and hence the EPAA). The first is that any claim that calls for an interpretation of the ESA or the EPAA (or regulations thereunder) arises under the ESA and is therefore within the exclusive jurisdiction of the district courts under Section 211 of the ESA. See, *e.g.*, *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711, 716 (Temp. Emer. Ct. App.), cert. denied, 444 U.S. 879 (1979); *Mountain Fuel Supply Co.* v. *Johnson*, 586 F.2d 1375, 1382 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979); *Mobil Oil Corp.* v. *Tully*, 639 F.2d 912, 915 (2d Cir.), cert. denied, 452 U.S. 967 (1981). The second is that there can be no money recovery against the government on such a claim, unless the government has taken the plaintiff's property without just compensation in violation of the Fifth Amendment. See, *e.g.*, *TransAmerican Natural Gas Corp.* v. *United States Dep't of Interior*, 816 F.2d 689, 691 (Temp. Emer. Ct. App. 1987), cert. denied, No. 86-1712 (Oct. 5, 1987); *Lunday-Thagard Co.* v. *United States Dep't of Interior*, 773 F.2d 322 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1055 (1986); *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources, Ltd.*, 577 F.2d 712 (Temp. Emer. Ct. App.), cert. denied, 439 U.S. 831 (1978); *Griffin* v. *United States*, 537 F.2d 1130 (Temp. Emer. Ct. App.), cert. denied, 429 U.S. 919 (1976) (ESA permits suit for unconstitutional taking). Both *Lunday-Thagard* and *TransAmerican* involved alleged violations of the same EPAA certification regulations at issue in this case.

a. Petitioners maintain (87-1359 Pet. 17-34; 87-1380 Pet. 11-15) that Section 211 of the ESA does not displace the Claims Court's Tucker Act jurisdiction (and therefore the Tucker Act's waiver of sovereign immunity), so that if a case comes within one of the categories described by the Tucker Act, the Claims Court has jurisdiction over it even though the case arises under the ESA within the meaning

of Section 211. Section 211(a), however, gives the district courts "exclusive original jurisdiction of cases or controversies arising under [the ESA], or under regulations or orders issued thereunder, notwithstanding the amount in controversy * * *."[7] By its terms, Section 211(a) deprives any court, including the Claims Court, of jurisdiction over cases that arise under the ESA or the EPAA. In *Trans-American*, TECA agreed with the Claims Court's conclusion in this case that there is no Tucker Act jurisdiction over claims that arise under the ESA. TECA therefore refused to transfer to the Claims Court certain ostensibly contract-based claims that involved the interpretation of the EPAA. 816 F.2d at 691-694.

Faced with the language and consistent interpretation of Section 211, petitioners point to cases in which this Court found that Tucker Act jurisdiction had not been withdrawn by other jurisdictional legislation. See 87-1359 Pet. 18-22; 87-1380 Pet. 11-15, citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), and *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). In those cases, however, the need to avoid possible Takings Clause questions led the Court to hold that any taking effected by the statutes at issue would be compensated in a Tucker Act suit. *Regional Rail Reorganization Act Cases*, 419 U.S. at 134 ("[t]here are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available"); *Monsanto*, 467 U.S. at 1020 (taking argument not ripe because any taking would be

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[7] As DeMenno/Kerdoon notes (87-1359 Pet. 41), Section 211(a) permits any court to decide "any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by an agency under this title) raised in any proceeding before such court." In this case, however, the EPAA issues are central to petitioners' claims and do not enter as part of a defense.

compensated under Tucker Act). Those considerations have no bearing on this case, because claims based on unconstitutional takings may go forward under the ESA and EPAA (see *TransAmerican,* 816 F.2d at 692, citing *Griffin* v. *United States,* 537 F.2d 1130 (Temp. Emer. Ct. App.), cert. denied, 429 U.S. 919 (1976); *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources Ltd.,* 577 F.2d 712, 716-717 (Temp. Emer. Ct. App.), cert. denied, 439 U.S. 831 (1978)).[8]

b. Petitioners also contend that these cases do not arise under the ESA, arguing that the district courts' exclusive ESA jurisdiction extends only to causes of action created by the ESA and that their causes of action sound in contract. They base this argument on what they contend is the normal meaning of the phrase "arising under" in jurisdictional statutes. 87-1359 Pet. 36-45; 87-1380 Pet. 17-22, citing *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson,* No. 85-619 (July 7, 1986).[9] A case arises under the ESA, however, if it "requires application and interpretation of the EPAA" (*Citronelle-Mobile Gathering, Inc.,* 591 F.2d at 716). This principle applies to contract

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[8] Although petitioners alleged unconstitutional takings in order to invoke the jurisdiction of the Claims Court (see Pet. App. A17), they do not actually suggest any "taking" other than a breach of contract, and do not seriously argue that there has been any violation of the Fifth Amendment (see *TransAmerican,* 816 F.2d at 693 n.7 (no takings claim based solely on contract overcharges)).

[9] Tipperary errs in implying (87-1380 Pet. 17-19) that under *Merrell Dow* a case arises under federal law for purposes of 28 U.S.C. 1331 *only* if it involves a federally created cause of action. *Merrell Dow* specifically rejected that rule and recognized that jurisdictional issues must be decided through a sensitive inquiry into the meaning and purpose of the relevant statutes (slip op. 4-8). Petitioners are incorrect in suggesting that there is some single, clear meaning that attaches to the words "arising under" whenever Congress uses them.

issues that require interpretation of EPAA regulations. *TransAmerican,* 816 F.2d at 693. The special jurisdiction created by Section 211 of the ESA reflects Congress' desire to ensure that the interpretation of the emergency price control legislation would be swift and uniform (see, *e.g., Citronelle-Mobile Gathering, Inc.,* 591 F.2d at 716). Accordingly, as *Merrell Dow* teaches, the words "arising under" in Section 211 have been construed so as to give effect to the underlying congressional purpose. *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.,* 604 F.2d 179, 182-187 (2d Cir. 1979). Petitioners' suggestion that the exclusive jurisdiction of the district courts extends only to claims that affirmatively rely on the cause of action created in Section 210 of the ESA is therefore incorrect.[10]

Petitioners also suggest (87-1359 Pet. 25-31; 87-1380 Pet. 20-21) that these cases involve, not the interpretation or application of the EPAA, but simply the interpretation of contracts which define their price terms by reference to the price control regulations.[11] TECA (see *TransAmerican,* 816 F.2d at 693) and the Federal Circuit in this case have properly rejected this distinction, under which contracting parties could opt out of the system Congress

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[10] Petitioners are also wrong in suggesting (87-1359 Pet. 31-34; 87-1380 Pet. 17-19) that the courts of appeals have paradoxically held that petitioners' causes of action both arise under the ESA and do not arise under the ESA. These cases arise under the ESA, and are within the exclusive jurisdiction created by Section 211 of the ESA, because they require the application of EPAA regulations. Petitioners are not entitled to any *relief* under the ESA, however, because Congress has not waived sovereign immunity with respect to non-takings claims that come within the exclusive jurisdiction created by Section 211.

[11] Even if this argument is correct, DeMenno/Kerdoon cannot possibly prevail on its contract respecting onshore oil, since that contract does not even refer to the regulated price.

established to ensure swift and uniform interpretation of the price control regulations, simply by agreeing to be bound by the law. Moreover, before it could consider this argument, the Court would first have to reach a question of contract interpretation not addressed below, and decide whether petitioners are correct in claiming that the agreements simply employ the regulations as a benchmark.

2. DeMenno/Kerdoon suggests (87-1359 Pet. 35) that it may obtain a money remedy in the Claims Court for violations of OCSLA, which required that sales of royalty oil to small refiners such as petitioners take place at the regulated price while price controls were in effect (43 U.S.C. 1353(b)(2) and (e)).[12] As this Court explained in *United States* v. *Mitchell,* 463 U.S. 206, 216 (1983), however, "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act." Rather, "the claimant must demonstrate that the source of substantive law he relies upon ' "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." ' " *Id.* at 216-217 (quoting *United States* v. *Testan,* 424 U.S. 392, 400 (1976), quoting *Eastport S.S. Corp.* v. *United States,* 372 F.2d 1002, 1009 (Ct. Cl. 1967)). No provision of OCSLA can fairly be interpreted as mandating compensation by the federal government to petitioners.

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[12] DeMenno/Kerdoon suggests (No. 87-1359 Pet. 46) that the "central purpose" of the 1978 OCSLA amendments was "to require the Government to comply with applicable price regulations in selling oil to small refiners during the regulation period." To the contrary, the principal purpose of the 1978 amendments was to expedite development of the Outer Continental Shelf without jeopardizing the environment. See H. R. Rep. 95-590, 95th Cong., 1st Sess. 53 (1977). We are aware of no mention in the legislative history of Congress' reason for adding the requirement that royalty oil be sold to small refiners at the regulated price.

DeMenno/Kerdoon asserts (87-1359 Pet. 35) that OCSLA mandates compensation and alludes to 43 U.S.C. 1339 in support of that proposition by citing *Amoco Production Co.* v. *Hodel,* 815 F.2d 352, 357 n.6, 360 (5th Cir. 1987) (43 U.S.C. 1339 can fairly be interpreted as mandating refunds by federal government to overpaying lessees), petition for cert. pending, No. 87-372; see also *United States* v. *Laughlin,* 249 U.S. 440, 442-443 (1919). Section 1339 does mandate compensation by the federal government in certain cases, but not in the case of DeMenno/Kerdoon. That provision states that lessees of offshore oil and gas leases may obtain refunds for overcharges by DOI. See 815 F.2d at 357 n.6, 360. Petitioners are purchasers of royalty oil, not lessees, and the provision does not apply to them. DeMenno/Kerdoon also points out (87-1359 Pet. 35 n.4) that 43 U.S.C. 1349(a)(1) authorizes "[citizen suits] * * * to compel compliance" with OCSLA. The citizen suit provision, however, refers only to compliance and does not mention any damages remedy against the United States.[13] Finally, 43 U.S.C. 1349(a)(6), on which DeMenno/Kerdoon also relies (87-1359 Pet. 35-36), preserves causes of action but does not purport to mandate compensation of its own force.

3. Finally, this case would present no issue worthy of review even if petitioners were correct about the jurisdiction of the Claims Court. As the Claims Court noted (Pet.

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[13] DeMenno/Kerdoon suggests (87-1359 Pet. 35 n.4) that this Court's decision in *Porter* v. *Warner Holding Co.,* 328 U.S. 395, 400 (1946), holds that a statutory provision authorizing enforcement of price controls implies a remedy for overcharges. In that case, however, the Court held that the statutory injunctive remedy implied that a court could use its equitable powers to require restitution. Recovery against the government, however, must rest on a statute creating an action for money damages, *United States* v. *Mitchell,* 463 U.S. at 216-217, not simply for equitable relief.

App. A25), petitioners alleged that DOI breached its contracts with petitioners during both the period after decontrol and the period when regulation was in effect. Because the ESA's exclusive jurisdiction does not apply to post-decontrol breaches, the Claims Court considered those allegations and found that petitioners had failed to exhaust their administrative remedies (*id.* at A25-A28). Petitioners have not challenged that holding in this Court, and they do not argue that they pursued their administrative remedies with respect to the alleged breaches that occurred while price controls were in effect. Petitioners' complaints also did not allege that they had complied with the Contract Disputes Act, 41 U.S.C. (& Supp. III) 601 *et seq.*, a necessary prerequisite for an action in the Claims Court on a contract covered by the Act. See, *e.g.*, *LDG Timber Enterprises, Inc.* v. *United States*, 8 Cl. Ct. 445, 451-452 (1985) (failure to certify claim to contracting officer deprives Claims Court of jurisdiction).[14]

Moreover, this case presents no question of continuing importance. Despite petitioners' suggestions to the contrary, it involves only the special jurisdictional features governing now-expired price control regulations. The predominant federal energy policy since the decontrol of the price of oil has been "to wind up regulation of the oil

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[14] Were the merits to be reached, it seems unlikely that petitioners would obtain any significant relief, even if they were to prevail on their miscertification claims, because they do not allege any significant harm: they do not claim that had DOI's certifications been timely they would have paid a lower price for the oil. Moreover, the Department of Energy is authorized to grant exceptions relief for certification errors such as petitioners allege (42 U.S.C. 7194), and has been prepared to do so in similar situations involving DOI. See *Department of the Interior – Laketon Asphalt Refining, Inc.*, 12 Energy Mgmt. (CCH) ¶ 81,012 (Dep't Interior 1984), review sought in *Laketon Asphalt Refining, Inc.* v. *DOE*, No. EV 84-264-C (S.D. Ind.)).

industry." *Johnson Oil Co.* v. *DOE*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982). Neither the substance of federal oil price regulation—which would determine the outcome of this case should the merits be reached—nor the scope of the exclusive jurisdiction created by Section 211 of the ESA has any ongoing significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 87-1359

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

DeMENNO/KERDOON,

Petitioner,

v.

THE UNITED STATES,

Respondent,

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Federal Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Rule 28.1 Listing. The required information is set forth in the Petition for Certiorari at p. iii and remains accurate.

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ARGUMENT

1. In language of notable clarity, the Tucker Act provides that the Claims Court "shall have jurisdiction to render judgment upon any claim against the United States" for breach of contract, 28 U.S.C. § 1491(a)(1) (1982), and thereby "'unequivocal[ly] waive[s]'" the immunity from suit the sovereign would otherwise be able to invoke against its aggrieved citizen, United States v. Mitchell, 463 U.S. 206, 215 (1983) (citation omitted).

There exists no fair indication, in either statutory language or legislative history, that Congress ever made a conscious judgment to withdraw that jurisdiction when the United States contractually promises to sell oil at prices established by other Federal laws, and thus render citizens remediless for the United States' breach of its contractual

promise. The absence of any such indicia of legislative intent is amply demonstrated by the fact that none is cited in the Brief For The United States In Opposition ("U.S. Brief"). On this controlling point, the telling feature of the U.S. Brief -- like Sherlock Holmes' "dog in the nighttime" -- is its silence.

Under this Court's consistent precedents, "implied repeal" of Tucker Act jurisdiction requires "'language showing that [Congress] made a considered determination to that end'". Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974) (citation omitted). "[T]he proper inquiry is not whether the statute 'expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy,' but 'whether Congress has in the [statute] withdrawn the Tucker Act grant of jurisdiction". Ruckelshaus

v. Monsanto Co., 467 U.S. 986, 1017 (1984) (emphasis added by Court; citation omitted). The United States can point to nothing in the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 et seq. (1982) ("EPAA"), or its legislative history that begins to meet the "implied repeal" tests articulated by these cases.

Instead, the Government defends the decisions below by lamely arguing that the rule against "implied repeal" should be limited to cases where repeal of Tucker Act jurisdiction (and the concomitant withdrawal of its waiver of sovereign immunity) would pose Fifth Amendment Taking Clause issues. See U.S. Brief at 8-9. This Court has never indicated, much less held, that its precedents against implied repeal of the Tucker Act are so limited; and any drastic limit on those precedents of the sort urged by

the United States should come from this Court, not the lower Federal judiciary.

The rule against implied repeal of the Tucker Act is of major doctrinal significance to this century-old statute governing actions against the United States, see United States v. Palmer, 128 U.S. 262, 269 (1888), and its interplay with other present and doubtless future Federal statutes. The central tenet of that doctrine is the requirement of deliberate legislative action by the Congress if it intends to render the United States free to breach contracts with its citizens or violate other positive law -- the outcome the Government here seeks. See Regional Rail Reorganization Act Cases, 419 U.S. at 133-34; Ruckelshaus v. Monsanto Co., 467 U.S. at 1017-19. Thus, the United States' suggested "Taking Clause" limitation on the doctrine -- particularly when

combined with the fact that the Federal Circuit is now the only court with appellate jurisdiction over Tucker Act suits -- demonstrates that the question presented merits review by this Court.

2. Beginning with its formulation of the question presented, the U.S. Brief seeks to characterize this case as only "ostensibly" involving breach of contract -- as though a party who brings a Tucker Act contract action to recover for breach of a contractual promise is simply engaging in "artful pleading" to avoid EPAA jurisdictional rules. The United States argues that an action for breach of express written contractual covenants must nonetheless be held to "arise under" the EPAA, not the contracts that embody the promises made by the United States and at issue in this suit. This expansive reading of "arising under" -- which conflicts

with this Court's reasoning in Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. __, 92 L. Ed. 2d 650, 654 (1986) -- is urged as necessary to vindicate Congress's desire for "swift and uniform interpretation" of Federal price control laws, expressed by its channeling such issues through the district courts and the Temporary Emergency Court of Appeals ("TECA"). See U.S. Brief at 10-11.

This argument is rather disingenuous coming from the United States. The effect of the decision below that these Tucker Act contract actions "arise under" the EPAA -- coupled with TECA's adoption in other cases of the Government's position that it has not waived sovereign immunity in EPAA suits -- is not "swift and uniform interpretation" of Federal price control laws. Rather, the result is no "interpretation" of such laws in

any forum in actions against the United States, even when it violates express contractual promises to be bound by such laws. The Government argues that EPAA swallows the Tucker Act not because it wants all EPAA issues litigated consistently in one court, but rather because it wants no EPAA issues litigated against it in any court, even when it violates a contract that incorporates EPAA standards.

The United States' argument is also unpersuasive on its own terms. Congress doubtless desired (and achieved) a considerable measure of swiftness and uniformity by directing that most cases presenting EPAA issues be entertained by the Federal district courts and by TECA on appeal. But it declined to establish any single-minded scheme of the sort required to support the Government's theory, which would presuppose that no court other than

the district courts and TECA may pass on EPAA questions under any circumstances. The EPAA itself provides (as the United States admits) that Federal price control issues arising by way of defense may be adjudicated by State courts. Similarly, actions under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 et seq. (1982) ("OSCLA"), which may also present issues of Government compliance with Federal price control laws, must be brought in the Claims Court under the Tucker Act -- as the Fifth Circuit has held at the United States' urging. Amoco Production Co. v. Hodel, 815 F.2d 352 (5th Cir. 1987), cert. pending, No. 87-372.

In short, Congress plainly did not believe that the virtues of consistent statutory interpretation required that all cases presenting Federal price control issues be entertained under the EPAA

procedural scheme. A Congress that intended (as the United States argued and the Fifth Circuit held in Amoco) that OCSLA actions asserting Government violation of Federal price control laws must be brought in the Claims Court under the Tucker Act, could not also have "intended" (as the United States argued and the Federal Circuit held here) to forbid the Claims Court to adjudicate Federal price control issues in actions arising under contracts with the Government incorporating those legal standards by reference.[1]

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[1]In conceding that courts other than the district courts and TECA may consider EPAA issues, the United States says there is a difference between "claims" and "defenses" -- but makes no effort to explain how that "difference" comports with the absolutist "uniformity of interpretation" thesis on which its implied Tucker Act repeal argument depends. See U.S. Brief at 8 n.7. Moreover, "uniformity" can be served by other means -- such as Claims Court deference in Tucker Act cases to TECA precedent on substantive EPAA issues -- without the damage to private party rights (and to this Court's precedents) inherent in any "implied repeal" theory.

The United States also argues that actions for breach of contracts incorporating Federal price control standards must be deemed to "arise under" the EPAA, lest everyone "opt out of" EPAA's procedural scheme simply by contracting to do what that Federal law requires. See U.S. Brief at 10-11. The supposed "logical extension" on which this argument rests transparently elides the very question presented in this case. Here, another Federal statute -- the Tucker Act -- expressly provides for Claims Court jurisdiction over contract actions against the United States, and the issue is whether EPAA repeals it. No such issue would or could be presented in a case involving only private parties. In any contract case not involving the United States, the aggrieved contracting party would not have a Tucker Act claim, and would have a district court remedy under the EPAA.

It is only in the circumstances presented here -- where the United States successfully contends in the Claims Court and Federal Circuit that EPAA repeals the Tucker Act, and successfully contends before TECA that EPAA does not waive its sovereign immunity -- that a party (guess who) is free to ignore its contract obligations and "opt out of" what Congress intended. The normal meaning of "arising under" advanced by DeMenno/Kerdoon comports with this Court's construction of Federal jurisdictional statutes in cases such as Merrell Dow, and does not (as the United States argues) permit private contracting parties to "opt out of" EPAA procedures. The expansive reading of "arising under" urged by the Government is inconsistent with Merrell Dow, and permits the United States to "opt out of" Tucker Act (or any other) liability for breach of its contractual promises.

The ultimate question presented is whether Congress intended that aberrational, manifestly unjust result. There is no indication in statutory language or legislative history that it did, much less that such a result is compelled by the statutory commands Congress did enact.

3. The United States claims that OCSLA, which independently requires the Department of Interior ("DOI") to comply with Federal price control laws, affords no basis for relief in this case. See U.S. Brief at 11 & n.12. In fact, OCSLA expressly creates a cause of action to "compel compliance" with its terms. 43 U.S.C. § 1349(a)(1). As the Government admits, such a provision in a price control statute authorizes restitution of illegal overcharges, see Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946) -- precisely the relief sought here.

The United States nonetheless suggests that OCSLA is not "a statute creating an action for money damages" as required by United States v. Mitchell, 463 U.S. at 216-17, to establish waiver of sovereign immunity. U.S. Brief at 11-12 & n.13. Once again, the United States seeks to evade liability for contractual breaches and violations of Federal law by placing a drastic limitation, never announced by this Court, on this Court's precedents.

A statutory action for "money damages" is not required for waiver of sovereign immunity where, as here, the claim is for return of money paid to but illegally extracted by the Government. United States v. Testan, 424 U.S. 392, 401-02 (1976). Second, even where the claim is not to recover monies previously paid but illegally extracted, the test for waiver of sovereign immunity is not whether the

statute says in terms that an action for "money damages" will lie. Rather, the test articulated by this Court is whether the underlying Federal statute "'can be fairly interpreted as mandating compensation by the Federal Government for the damages sustained.'" United States v. Mitchell, 463 U.S. at 217, and United States v. Testan, 424 U.S. at 402, both quoting Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967). OCSLA -- which expressly requires Government compliance with its terms and expressly authorizes actions to "compel compliance," a remedy that concededly includes restitution of illegal overcharges -- plainly meets that standard.[2]

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[2]Indeed, by any standard, the statutory basis for monetary relief against the United States is far clearer in the case of illegal overcharges under OCSLA than that which a majority of this Court found sufficient in United States v. Mitchell. See 463 U.S. at 219-28.

For both reasons, the United States' contention that OCSLA does not permit monetary relief in the circumstances presented contravenes settled law.

4. The weakness of the United States' position on the jurisdictional issue decided below is highlighted by its efforts to avoid review of that issue on other grounds. The Government variously suggests that petitioner did not exhaust administrative remedies or comply with the Contract Disputes Act as to claims arising before oil price decontrol (arguments not adopted by the courts below); that the Department of Energy ("DOE") might grant DOI a retroactive exemption from the regulations it violated;[3] that

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[3]In fact, DOE has not granted DOI an exemption for the transactions at issue; and DOE's disputed "authority" to grant "retroactive exemptions" in any case has yet to be reviewed by any Federal court.

most of DOI's violations were only technical in nature, and that it is "unlikely" DeMenno/Kerdoon "would obtain any significant relief" on the merits;[4] and that "federal oil price regulation" issues have no "ongoing significance." See U.S. Brief at 12-14 & n.14.

The last assertion rings hollow indeed to the American oil refining industry, whose companies large and small continue to face massive Government claims for overcharges during the regulated period. The "no ongoing significance" claim is particularly ironic in DeMenno/Kerdoon's case, since the United States presently is asserting claims against it for over $179,000,000 (an amount far in excess of its net worth) based on the same sorts of

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[4]This argument assumes facts not of record, and goes to the merits of claims that have never been adjudicated, due to dismissal below on jurisdictional grounds.

alleged violations that the United States committed here.

In denigrating the importance of this case by speculations about the merits and other matters not before this Court, the United States seeks to ignore the continuing significance of the issues that are presented for review -- "implied repeal" of the Tucker Act and the meaning of "arising under" in Federal jurisdictional statutes. Both issues will have significant, ongoing impact on the law governing claims against the United States; and both were erroneously decided below, on the basis of arguments that ignore or severely restrict this Court's precedents.

Moreover, both issues were decided in a context that permits the Government not only to ignore Federal laws with which Congress said it must comply, but also to

violate with impunity contracts it freely entered. The United States, having previously persuaded TECA that the district courts may not entertain EPAA actions against it because it has not waived sovereign immunity, has now persuaded the Federal Circuit that the Claims Court may not entertain these Tucker Act contract actions because they are "really" EPAA claims that must be brought in the district courts. Since TECA has exclusive jurisdiction of EPAA appeals, and the Federal Circuit has exclusive jurisdiction of Tucker Act appeals, only this Court is able to correct these mutually inconsistent lower court holdings.

Congress could not have intended the absurd outcome of the combined TECA and Federal Circuit holdings on these issues. Nor could it have intended the resulting manifest injustice to private parties who

contracted in good faith with the United States, and are now left without a remedy in any forum for the Government's breach of its contractual promises.

This Court has previously corrected per curiam a similar injustice, premised upon similar sophistic arguments by the United States about a supposed "implied repeal" of Tucker Act jurisdiction rendering it immune from liability. See Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980). DeMenno/Kerdoon respectfully submits that a similar grant of certiorari and summary reversal would be equally appropriate in the case at bar.

CONCLUSION

For the foregoing reasons and those set forth in the Petition For Certiorari, the petition should be granted and the decision below reversed.

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